

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 139/09
5138098

BETWEEN SHOBNA NAOMI PRAKASH
Applicant

AND CHIEF EXECUTIVE OF THE
DEPARTMENT OF
CORRECTIONS
Respondent

Member of Authority: Alastair Dumbleton

Representatives: Michelle Finch, counsel for Applicant
David Traylor, counsel for Respondent

Investigation Meeting: 25 February 2009

Determination: 4 May 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In her application to the Authority, the problem or matter Ms Shobna Prakash has stated that she wishes to have resolved is:

- (a) Whether she was a “*person intending to work*” and was therefore an employee under the Employment Relations Act 2000; and
- (b) If so, whether she was unjustifiably dismissed from her position as a Corrections Officer employed by the Department of Corrections.

[2] Ms Prakash claims that although she was engaged as an employee by the Department it later rejected her assertion of being such, thereby dismissing her. She contends her dismissal was unjustifiable and asks the Authority to order the Department to reimburse her for lost remuneration and to also compensate her for

humiliation, loss of dignity and injury to feelings, which are among the remedies available to an employee bringing a successful personal grievance claim.

[3] In opposing the claim the Department contends that Ms Prakash did not become an employee as defined by the Act and therefore had no employment with the Department that could have been terminated by it, whether by dismissal or in any other way.

[4] Mediation undertaken by the parties did not resolve the employment relationship problem.

[5] After applying for a Corrections Officer position with the Department in 2007, Ms Prakash successfully passed through several steps or checks as required by the Department under its defined recruitment process. Her evidence is that she was told by the Regional Recruitment Co-ordinator, Ms Faavaoa Paramore, that after she had completed the final step she would receive an offer of employment. Ms Prakash says that when the last step was completed she advised Ms Paramore who said “*you’re in, although I’m not sure about him yet.*” “*Him*” was taken to be a reference to Mr Rick Williams, Ms Prakash’s partner, who had also applied for a Corrections Officer position at the same time.

[6] Ms Prakash’s further evidence was that Ms Paramore rang her after she had completed the last pre-employment stage and gave “*congratulations.*” She said she had assumed she would receive a letter confirming her discussion with Ms Paramore but did not get one. She also claimed that Ms Paramore had told her there would be a confirmation letter in the post. Although she had not received a letter she still maintained that during discussions with Ms Paramore there had been offer and acceptance.

[7] In her evidence Ms Paramore denied saying at any time to Ms Prakash that she had been accepted for employment by the Department. She also denied telling Ms Prakash that an offer of employment would follow once the recruitment process had been successfully completed. She said that she had congratulated Ms Prakash for having passed the final stage of the process, normally after which a letter is prepared containing an offer of employment to a successful candidate.

[8] There is no dispute that such a letter was not prepared for sending to Ms Prakash.

[9] Ms Paramore also denied that she had said anything to Ms Prakash about her partner and rejects the suggestion that she would have discussed the application of someone else with any applicant. She said that although Ms Prakash did pass all the stages she was advised that she would not be getting an offer of employment in the current recruitment round but would be eligible to be considered for an offer in the next intake.

[10] Where it conflicted with that of Ms Prakash, I prefer the evidence of Ms Paramore. I find that although Ms Paramore spoke to Ms Prakash in a welcoming and encouraging way about her job application and completion of the steps, she did not say anything that in the circumstances could reasonably have been interpreted as an offer of employment. Neither did she misrepresent the operation of the Department's recruitment process, I find.

[11] From her successful completion of all the required steps and the encouraging words of Ms Paramore, Ms Prakash certainly had good reason to hope or even expect that she was going to be offered a position. But, as Ms Prakash accepted in her evidence, she had been advised that under the Department's recruitment procedures offers of positions of employment were to be confirmed in writing. This was explained during a power point presentation to applicants about the recruitment process. One of the slides shown to Ms Prakash over the title "*Offer of employment*" began with the action "*Provisional job offer is sent to applicant*" and concluded with the action "*Confirmation of job offer is sent to applicant.....*"

[12] Another slide in the Department's presentation attended by Ms Prakash depicted in a summary of "*Corrections Recruitment Process*" the provisional job offer and the confirmation of the job offer as the last two actions taken.

[13] My finding is supported by the evidence of Ms Prakash's mother Ms Judith Brocklebank. She said that Ms Prakash had told her of the progress she had been making through the various stages of the recruitment process and that after they were completed, in January 2008, Ms Prakash became concerned when she had not received a letter confirming the offer of employment. Ms Prakash's concern was heightened when her partner received a letter offering him a Corrections Officer position.

[14] I consider the concern of Ms Prakash naturally flowed from her clear knowledge and understanding, through what the Department had previously told her, that in accordance with the recruitment process any offer of employment would be made and confirmed in writing to her. It is quite understandable that Ms Prakash became concerned when she learned that another applicant, Mr Williams her partner, had received an offer letter, but I do not consider in the circumstances Ms Prakash could reasonably have believed that somehow an exception was going to be made in her case and that an oral offer would be sufficient, when all applicants in her group had been told that any offer would be in writing.

[15] Whether a person is a “*person intending to work*” is not to be determined solely from the subjective intention of that person. There is no issue between the parties that to become such under s 6 of the Act, a person must have been offered and have accepted work as an employee. There is no dispute that such offer or acceptance need not be in writing.

[16] I accept the further point made for the Department that the acceptance of an offer must be communicated to the offeror before a binding agreement is made.

[17] While a statement that “*you’re in*” might, depending on the circumstances, be sufficient to amount to an offer of employment, silence and inactivity by the employee-offeree will not usually amount to the communication of acceptance of the offer. Ms Prakash says that in reliance upon the offer she claims was made, she changed her residential and other personal arrangements, but in the circumstances of this case the action of taking those steps, which were not necessarily known by the employer, cannot amount to the communication of acceptance.

[18] I find that the words of encouragement used by Ms Paramore and her welcoming manner displayed towards Ms Prakash, could not reasonably have been taken as an offer of employment by Ms Prakash who had been given clear advice that such offers were to be made formally in writing by the Department.

[19] In relation to the claim that Ms Paramore misrepresented to Ms Prakash the Department’s process of selection for employment, allegedly by saying that an offer of employment would automatically follow completion of all the stages or steps, I find from the evidence that she did not.

[20] In any event, as a general proposition, claims alleging misleading or deceptive conduct carried on before any employment relationship has been formed cannot found an employment relationship problem under the Act. The Authority cannot resolve such claims under its jurisdiction.

Determination

[21] I find that there was no offer of employment made to Ms Prakash, although having passed all of the stages of the recruitment process she had good reason to hope or even expect such an offer would be made. Therefore she did not become a person intending to work and did not become an employee of the Department of Corrections. It follows that she was not dismissed from any position of employment and accordingly she is unable to raise a personal grievance under the Employment Relations Act about her claim in that regard.

Costs

[22] Costs are reserved. Counsel are expected in the usual way, to confer with a view to resolving themselves this question between the parties. If that proves not to be possible, application should be made by the Department for an order within 21 days of the date of this determination. Ms Prakash shall have a further 14 days after that time in which to provide any response to the application in writing.

A Dumbleton
Member of the Employment Relations Authority